

This comment letter focuses on two areas: (1) the purpose of the ordinance and (2) variances.

### **Purpose of the Landmarks Ordinance**

Statutory enabling legislation, 62.23(7)(em), Wis. Stats., gives cities the authority to regulate by ordinance “any place, structure or object with a special character, historic, archaeological or aesthetic interest, or other significant value, for the *purpose of preserving the place, structure or object and its significant characteristics.*” (emphasis added) This authority does not include other purposes, such as ensuring “the harmonious, orderly, and efficient growth” of a city,” or providing a “framework for reinvestment” in a city’s historic districts or “balancing, and accomplishing” these policies. Nor does the State recognize that “new design and construction” is a foregone conclusion, as does the current draft when it states in two places “new design and construction, when it happens ...”

The draft ordinance states historic preservation is in the “public interest,” while the current ordinance says that it is a “public necessity.” Putting aside any legal arguments as to the distinction, if any, between these two phrases, the use of “public interest” gives the appearance of downgrading the goal of historic preservation.

Rather than having a purpose of “perpetuation” of historic resources, the draft speaks to “conservation” of those resources. “Conservation” can mean protection, but that is already listed as a purpose. “Conservation” can also mean preservation and when read with purpose (5), “by establishing an obligation to maintain them, and encouraging the vigorous enforcement of this ordinance” it could mean that the use of “conservation” is limited to making sure the historic resources are maintained. Not that this is not a laudable goal, but it is not the same as “perpetuation.”

Further, I dispute the inclusion in (5) regarding the “City’s investment in [historic resources].” For the most part, the City has not invested in historic resources. In fact, it reaps the benefits of historic resources by the continually increasing property tax values. This appears to have been inserted to justify the vigorous enforcement of obligations. The City, since it has not invested in historic resources on a broad scale, cannot use this to justify heightened enforcement.

Other Wisconsin cities maintain historic enhancement and perpetuation/preservation as the purpose for their historic ordinances. Most of these cities also see these purposes as a public necessity. When “promote” is a purpose, the promotion is specified: promote the historic resources for the education, pleasure, and welfare of residents.

Milwaukee:

320-21. Historic Preservation Commission.

1. PURPOSE AND INTENT. Pursuant to s. 62.23(7)(em), Wis. Stats., it is declared a matter of public policy that the protection, **enhancement, perpetuation**, and use of improvements of special architectural character or special historical interest or value is a **public necessity** and is required in the interest of health, prosperity, safety, and welfare of the people. The purpose of this section is to:

- a. Effect and accomplish the protection, enhancement and perpetuation of such improvements and of districts which represent or reflect elements of the city's cultural, social, economic, political and architectural history.
- b. Safeguard the city's historic and cultural heritage, as embodied and reflected in landmarks and historic districts.
- c. Stabilize and improve property values.
- d. Foster civic pride in the beauty and noble accomplishments of the past.
- e. Protect and enhance the city attractions to residents, tourists and visitors, and serve as a support and stimulus to business and industry.
- f. Relate municipal programs in preserving housing and revitalizing commercial areas to the objectives of historic and architectural preservation.
- g. Educate the public regarding the desirability of landmark designation and historic preservation as an enhancement of the quality of life.
- h. Aid and assist individuals and public entities in the nomination of their properties to the national register of historic places.

Appleton:

Sec. 23-651. Historic preservation.

(a) Purpose. It is hereby declared a matter of public policy that the protection, enhancement, preservation and use of improvements or sites of special character or special architectural, archeological or historic interest or value is a **public necessity** and is required in the interest of the health, prosperity, safety and welfare of the people. The purpose of this section is to:

- (1) Effect and accomplish the protection, **enhancement and preservation** of such improvements, sites and districts which represent or reflect elements of Appleton's cultural, social, economic, political, artistic and architectural history;
- (2) Safeguard Appleton's historic, prehistoric and cultural heritage, as embodied and reflected in such historic structures, sites and districts;
- (3) Foster civic pride in the notable accomplishments of the past;
- (4) Stabilize and improve property values and enhance the visual and aesthetic character of Appleton;
- (5) Protect and enhance Appleton's attractions to residents, tourists and visitors, and serve as a support and stimulus to business and industry.

Eau Claire:

2.65.010 Purpose and intent. It is hereby declared a matter of public policy that the protection, enhancement, perpetuation and use of improvements of special character or special historical interest or value is a **public necessity** and is required in the interest of health, prosperity, safety and welfare of the people. The purpose of this chapter is to:

- A. Effect and accomplish the protection, **enhancement, and perpetuation** of landmarks and historic districts which represent or reflect elements of the city's cultural, social, economic, political and architectural history.
- B. Safeguard the city's historic and cultural heritage, as embodied and reflected in such landmarks and historic districts.
- C. Stabilize and improve property values.
- D. Foster civic pride in the beauty and noble accomplishments of the past.
- E. Protect and enhance the city's attractions to residents, tourists and visitors.
- F. Serve as a support and stimulus to business and industry.
- G. Strengthen the economy of the city.
- H. **Promote** the use of landmarks and historic districts for the education, pleasure, and welfare of the people of the city.

Green Bay:

13-1501. Purpose and intent. It is hereby declared a matter of public policy that the protection, enhancement, perpetuation, and use of improvements or sites of special character or special architectural or historic interest or value is a **public necessity** and is required in the interest of the health, prosperity, safety, and welfare of the people. The purpose of this section is to:

- (a) Protect, **enhance, and perpetuate** such improvements, sites, and districts which represent or reflect elements of the City's cultural, social, economic, political, and architectural history.
- (b) Safeguard the City's historic and cultural heritage, as embodied and reflected in such historic structures, sites, and districts.
- (c) Foster civic pride in the notable accomplishments of the past.
- (d) Stabilize and improve property values.
- (e) Protect and enhance the City's historic districts, structures, and sites for the benefit of residents, tourists, and visitors and serve as a support and stimulus to business and industry.

Kenosha:

15.01 INTENT, PURPOSE, AUTHORITY AND APPLICATION

It is the intent of the City to exercise its zoning and police powers in order to promote the health, safety and general welfare through the regulation and preservation of historic districts, structures and sites with a special character, historic interest, aesthetic interest or other significant value, in accordance with §62.23(7)(em), Wisconsin Statutes, and other applicable law. This Section is applicable to all private property and public property (including City property) subject to the City Zoning Ordinance.

The purpose of this Ordinance is to:

- A. Effect and accomplish the protection, **enhancement, and perpetuation** of such historic districts, structures and sites which exemplify or reflect elements of the City's cultural, social, economic, political, engineering and architectural history.
- B. Safeguard the City's history and heritage, as embodied and reflected in such historic district's structures and sites.
- C. Stabilize and improve property values.
- D. Foster civic pride in the beauty and noble accomplishments of the past.

- E. Protect and enhance the City's historic districts, structures and sites for the benefit of residents, tourists and visitors, and serve as a support and stimulus to business and industry.
- F. Strengthen the economy of the City.
- G. **Promote** the use of historic districts, structures, and sites for the education, enjoyment and welfare of the people of the City.

Oshkosh:

SECTION 30-76 HISTORIC PRESERVATION

A) Purpose

The purpose of the Historic Preservation Ordinance is to:

- 1) Protect, **enhance, and perpetuate** historic landmarks, landmark sites, and historic districts which represent or reflect distinctive and important elements of the City's and State's architectural, archaeological, cultural, social, economic, ethnic, and political history and to develop appropriate settings for such places;
- 2) Safeguard the City's historic and cultural heritage, as embodied in such historic landmarks, landmark sites, and historic districts by appropriate regulations and through provision of technical assistance to owners of landmark properties;
- 3) Stabilize and improve property values;
- 4) Foster civic pride in the beauty and accomplishments of the past;
- 5) Protect and enhance the City's attractions to residents, tourists, and visitors, and to provide support and stimulus to business and industry;
- 6) Strengthen the economy of the City; and
- 7) **Promote** the use of historic landmarks, landmark sites, and historic districts for the culture, education, and general welfare of the people of and visitors of the City.

Waukesha:

22.51 HPD Historic Preservation Overlay District

(1) PURPOSE. It is hereby declared a matter of public policy that the protection, enhancement, perpetuation and use of improvements of special character or special historical interest or value is a **public necessity** and is required in the interest of health, prosperity, safety and welfare of the citizens of the City. The purpose of the HPD Overlay District is to effect and accomplish the protection, **enhancement, and perpetuation** of such improvements and of districts which represent or reflect elements of the City's cultural, social, economic, political, and architectural history; safeguard the City's historic and cultural heritage, as embodied and reflected in such landmarks and historic districts; stabilize and improve property values; foster civic pride in the beauty and noble accomplishments of the past; protect and enhance the City's attractions to residents, tourists, and visitors for education, pleasure and general welfare; and serve as a support and stimulus to business and industry; and strengthen the economy of the City.

West Allis:

12.88. Historic Preservation.

(1) Purpose and Intent. It is hereby declared a matter of public policy that the protection, enhancement, perpetuation and use of improvements or sites of special character or

special architectural, archaeological or historic interest or value is a public necessity and is required in the interest of the health, prosperity, safety and welfare of the people. The purpose of this section is to:

- (a) Effect and accomplish the protection, **enhancement, and preservation** of such improvements, sites and districts which represent or reflect elements of the City of West Allis' cultural, social, economic, political and architectural history.
- (b) Safeguard the City of West Allis' historic, prehistoric and cultural heritage, as embodied and reflected in such historic structures, sites and districts.
- (c) Stabilize and improve property values, and enhance the visual and aesthetic character of the City of West Allis.
- (d) Protect and enhance the City of West Allis' attractions to residents, tourists and visitors, and serve as a support and stimulus to business and industry.

The following are a few ordinances of other cities with respect to the duties of the landmark/historical commission. It is interesting to note that these ordinances focus on preserving and safeguarding historic properties: they do not ask their commissions to provide a framework for reinvestment in historic districts, or to “recognize” that historic resources as economic assets.

#### West Allis

##### 2.55 Historical Commission.

(1) Purpose. To preserve, safeguard and promote the historic heritage of the city and its locality; to manage publicly owned or leased historical properties; to preserve and care for all records and other articles and materials of historical interest on behalf of the city; to promote and foster the historical education, pleasure and welfare of the community; and, to otherwise promote the general health, safety and welfare of the community; for these purposes and the necessity therefore in the public interest, the provisions of this section are enacted and declared as a matter of legislative determination and intent.

#### Oshkosh:

##### SECTION 2-48 LANDMARKS COMMISSION

..

##### B) Duties, Purposes, and Functions

The Landmarks Commission:

...

4) Shall foster the protection, enhancement, and perpetuation of historic improvements and of Districts which represent or reflect elements of the City's cultural, social, economic, political and architectural history.

5) Shall safeguard and foster civic pride in the City's historic and cultural heritage as embodied and reflected in landmarks and historic districts.

...

This Committee was encouraged early in this process to have a broader scope of purpose – that historic districts are not museums but are “an important part of the evolving urban fabric.” Several statements of purpose from other ordinances (but not ordinances from Wisconsin cities)

were provided, one of which was for Charleston: “To insure the harmonious, orderly and efficient growth and development of the municipality.” Charleston Ord. 54-230.

Yet, what is the purpose of Charleston’s ordinance in its entirety? After the edited snippet provided to this Committee, the remainder of the ordinance is devoted to the need for preservation.

Sec. 54-230. - Purpose of creating districts.

In order to promote the economic and general welfare of the city and of the public generally, and to insure the harmonious, orderly and efficient growth and development of the municipality, it is deemed essential by the city council of the city that the qualities relating to the history of the city and a harmonious outward appearance of structures which preserve property values and attract tourist and residents alike be *preserved*; some of these qualities being the *continued existence and preservation of historic areas and structures*; continued construction of structures in the historic styles and a general harmony as to style, form, color, proportion, texture and material between structures of historic design and those of more modern design; that such purpose is advanced through the *preservation and protection of the old historic or architecturally worthy structures and quaint neighborhoods* which impart a district aspect to the city and which serve as visible reminders of the historical and cultural heritage of the city, the state, and the nation. (emphasis added)

## Variances

### Economic Hardship

The draft language does not address a property owner who overpays for a property. A property owner who bought a property for \$1 million when the property was assessed by the City at \$300,000 would have an “economic hardship” if the property owner could not develop the property. The Zoning Board of Appeals has a requirement that could be useful for this draft. MGO sec. 28.184(5)(a)5. requires:

“The alleged difficulty or hardship is created by the terms of the ordinance rather than by a person who has a present interest in the property.”

The draft language would not necessarily address a homeowner who cannot afford to restore a unique architectural feature. For example, if a homeowner has a half-moon attic window that would require custom work to repair/replace and would cost \$3,000, the homeowner may currently be allowed to take action to prevent further deterioration of the window rather than replacing the window. Many, or most, homeowners do not track improvement costs and maintenance costs and could not supply this data which is required under the current draft.

The draft provides: “Strict literal application of the standard would deny the property owner a reasonable rate of return on investment, or would impose upon the property owner an unreasonable and unnecessary financial hardship.” These criteria go beyond what even the Zoning Board of Appeals can grant as a variance. The Zoning Board of Appeals, under MGO 28.184(5) must find one of the following conditions to be present:

3. For a use variance, compliance with the strict letter of the ordinance will result in no reasonable use of the property.
4. For an area variance, compliance with the strict letter of the ordinance would unreasonably prevent use of the property for a permitted purpose or would render compliance with the ordinance unnecessarily burdensome.

The Zoning Code defines these variance as:

Variance, Area. An authorization by the Zoning Board of Appeals for the construction or maintenance of a building or structure in a manner which is inconsistent with dimensional standards contained in the zoning ordinance.

Variance, Use. An authorization by the Zoning Board of Appeals for the use of property in a manner which is inconsistent with the listed uses contained in the zoning ordinance.

Violation of historic standards should not occur in order to help ensure that a developer will make money. What if the investment costs are high because the developer is building luxury housing? If the costs rise because of the luxuries, resulting in the developer facing an “economic hardship” should the historic standards be violated (e.g., another story or two so the rate of return is “reasonable”)? The City’s *TIF Goals, Objectives and Process* makes luxury housing ineligible for TIF assistance. Similarly, the additional costs of luxury housing should not be able to be used to justify an “economic hardship.”

The two criteria, a “reasonable rate of return on investment” and “financial hardship” are not defined. Is the reasonable return on investment before or after tax? The Judge Doyle Square project back in 2013 was looking at a 20.1% return on investment. Perhaps the better way would be to use the Zoning Board of Appeals language, language which has been interpreted by the courts.

Milwaukee’s ordinance regarding hardship requires more documentation and requires that four conditions be met

“... If claiming that denial of the certificate or the conditional approval of the certificate causes unreasonable economic hardship for the owner, the applicant shall provide clear and convincing evidence that any hardship is not self-created or the result of failure to maintain the property in good repair, that there is no reasonable use for the property, that there is no reasonable way to adapt the property for alternative use, and that there has been no reasonable offer to purchase the property despite at least 2 years of ongoing substantial effort to sell the property other than an owner-occupied one- or 2-unit residential property, the applicant shall provide the following information to the city clerk not less than 5 days prior to the public hearing: ...” 320-21(11)

## Public Interest

This variance would allow the Landmarks Commission to weigh competing public interests and determine whether another public interest outweighs historic preservation.

The City, and the State, have determined that historic preservation promotes the health, safety and the general welfare. Should an appointed body have the authority to override this determination, especially an appointed body most likely lacking expertise in evaluating other public interests? Or is the more global weighing of the public good the province of the elected Common Council? Perhaps these criteria should be included in the appeal section in order to provide guidance to the Common Council on the reasons for reversing or modifying a Landmarks Commission decision.

To reverse or modify a Landmarks Commission decision, a vote of 2/3 of Common Council members is required. It is more appropriate to have this super-majority required when balancing competing public interests than it is to have a super majority required to overrule an appointed commission's weighing of competing public interests.

Milwaukee's historic preservation ordinance is an example of this approach:

320-21. Historic Preservation Commission.

11. Regulation of Alteration, Reconstruction, Rehabilitation, Construction and Demolition

After a public hearing at the next regularly-scheduled meeting of the appropriate common council committee, the council may, by vote of 2/3 of its members, reverse or modify the decision of the commission if, after balancing the interest of the public in preserving the subject property and the interest of the owner in using it for his or her own purposes, the council finds that, owing to special conditions concerning to the specific piece of property, failure to grant the certificate of appropriateness will preclude any and all reasonable use of the property or will cause unreasonable economic hardship for the owner, provided that any self-created hardship or failure to maintain the property in good repair shall not be a basis for reversal or modification of the commission's decision.

## Miscellaneous Comments

### Third Lake Ridge

As I commented in my letter of 25 June, the use of "other historic resources" in the standards, along with the definition of historic resources (properties constructed during the period of significance, 1850-1929) means that a property that is not a historic resource would not be subject to the standards. In the case of 41.23(6), a non-historic resource would not be limited in height.

41.23(6) Standards for Exterior Alterations in the Third Lake Ridge Historic District - Parcels Zoned for Mixed-Use and Commercial Use.



1) Any exterior alterations on parcels zoned for mixed-use and commercial use that are located within 200 feet of other historic resources shall be visually compatible with those historic resources in the following ways:

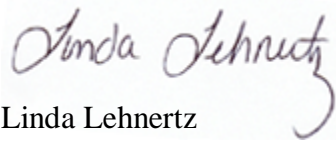
(a) Height

Construction Vibration

As larger buildings are being built, the pilings are getting deeper and vibration is getting worse. Concern should be given to the historic resources and the effect of construction on those historic resources. In some case that construction is occurring as close as ten feet to a historic resource.

Additionally, historic resources should be protected from damage caused by road construction.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Linda Lehnertz". The signature is written in dark ink on a light-colored background.

Linda Lehnertz